No. 20941

United States
COURT OF APPEALS
for the Ninth Circuit

ILMAR KOIVUNEN,

Plaintiff-Appellant,

v.

STATES LINE,

Defendant-Appellee.

APPELLANT'S BRIEF

Appeal from the Judgment of the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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JURISDICTION

This is an appeal from the judgment of the United States District Court from the District of Oregon dated January 14, 1966 in favor of plaintiff-appellant and against defendant-appellee in the sum of $1,000, pursuant to a jury verdict (R. 11).

Jurisdiction of the district court was based upon 28 U.S.C., Sec. 1332, and the jurisdiction of this court is based upon 28 U.S.C., Sec. 1291, by reason of a No-

tice of Appeal filed March 1, 1966 (R. 21), after the district court had denied a motion for a new trial on February 7, 1966 (R. 19).

Reference is made to the pre-trial order which superceded the pleadings, and which demonstrates diversity of jurisdiction (R. 3).

STATEMENT OF THE CASE

This is an action to recover damages for personal injuries received by appellant, a longshoreman, on December 23, 1963, while he was loading cargo on appellee's vessel the S. S. OHIO at Coos Bay, Oregon. Appellant was working in a lower 'tween deck hatch when shoring collapsed upon him.

The case was tried to a jury which rendered its verdict in favor of appellant in the sum of $1,000 (R. 10). Judgment was entered upon the verdict (R. 11) and plaintiff's motion for a new trial and/or additur (R. 13) was denied by the district court (R. 19).

The appeal involves only one question, whether the district court properly submitted the issues of plaintiff-appellant's alleged contributory negligence to the jury. The appellee had charged the appellant with negligence in the following particulars:

1. Failing to keep a lookout of his own safety.
2. Loosening the existing bracing for the upright shoring material prior to roping off or otherwise securing said upright shoring material.
3. Failing to rope off or otherwise secure the up-

right shoring material prior to commencement by himself and the other longshoremen of removal of the existing bracing for the upright shoring (R. 6).

STATEMENT OF FACTS

Plaintiff is a 50 year old longshoreman who has been engaged in that occupation since 1952 and who has worked on all types of vessels and is familiar with the various methods of storing cargo on American vessels in Coos Bay and on the Pacific Coast (Tr. 2-4).

On December 27, 1963 at about 1:00 P.M. plaintiff began work to unload cargo on the defendant's vessel, The S. S. OHIO, at the Georgia-Pacific Dock in Coos Bay (Tr. 4-5). He was working in hatch number two with three other longshoremen, his son Gene, who is also his partner, and Grant Taylor and Harry Meyers (Tr. 5-6). Mr. Taylor and Mr. Meyers were working on the port side (Tr. 6). The cargo consisted of bales of pulp weighing 450 pounds or better stacked up one on top of the other seven or eight high fore and aft in the hatch, and in each of the wings, leaving the center area directly under the hatch open (Pl. Ex. 8).

The S. S. OHIO was loaded in Longview, Washington and it crossed the Columbia River Bar and encountered force 8-9 winds, from about 45 to 50 miles an hour, which would have made the ship pitch and roll moderately in a rough southerly sea (Tr. 57-60). The vessel arrived in Coos Bay and lay at the dock for three or four days thereafter.

The cargo was stowed in the number two hatch as indicated and shored up by vertical boards reinforced by "toms" running from the top of the shoring to the deck where they were nailed (Tr. 10-11). All of the weight of the cargo and the shoring rested against the nail which was placed at the bottom of the "tom" so that a tremendous pressure was created so that when the ship was in movement a little bit of movement of the shoring would loosen the nails and cause the toms to give and drop down (Tr. 10-11).

There was no opposite or lateral bracing against the foot of the tom on the deck, only two little pieces of two-by-fours alongside (Tr. 11).

The usual method of shoring bales of paper on a ship is to make it secure with what is known as an inverted A frame. This is the type of shoring built on practically every ship that has come in and out of Coos Bay. Such a frame, as shown in Plaintiff's Exhibit 10, which prevents the cargo from collapsing the shoring outward or sideways (Tr. 12-14).

Plaintiff and his son began to work on the starboard side of the hatch and the other two longshoremen on the port side. They were ordered to secure the fencing on the aft and forward end of the hatch with a rope and take out the "toms". They were then instructed to take the shoring completely off from the timbers. Plaintiff and his son started from the aft working forward. They secured the shoring with a "gantline" in the aft end and took the "toms" out and had begun to remove part of the shoring (Tr. 6-7).

Plaintiff stopped to move a thermos bottle to the forward end of the hatch where it would be safe and after he had placed the bottle close to the wing of the ship and was walking back to his work, he stopped to pick up a peavey and the shoring at the forward end collapsed and fell on him causing injuries to the plaintiff (Tr. 7-8). The total weight of the lumber which landed on the plaintiff was about six or seven hundred pounds (Tr. 8). Prior to the accident, neither plaintiff nor anyone else had touched the "toms" in that part of the hatch (Tr. 9-10).

Plaintiff was knocked out when the shoring came down and when he came to he had severe pain in his left side below the ribs and had difficulty in talking. He also had pain in his left shoulder and difficulty in breathing. He sat there for about an hour and realized that his right foot was swelling up. He was able to climb the ladder to the deck and reported the accident and was taken home and then to a doctor the same evening (Tr. 16-18).

As a result of the accident, the plaintiff was off work for about fourteen days continuously and during this time his foot swelled up "pretty big" and he had constant headaches. He was treated with aspirin and told to soak his foot and started physical therapy by putting his foot in a whirlpool bath and with massage (Tr. 18-19). He continued to have pain in his left side and his left arm began going dead and getting numb and he continued to have severe headaches. He had great stomach distress after every meal. Although the plaintiff

had a small duodenal ulcer in 1954, plaintiff's physicians testified that his stomach distress was caused by a hiatal hernia, which is a permanent condition and will require future medical care and treatment, probably surgery which would cost at least four to six hundred dollars, together with hospitalization of $500 (Tr. 75-77, 86-87).

In addition, plaintiff was diagnosed as having a chronic cervical syndrome with a probable nerve root injury, a flat foot and chronic strain of the right foot and soft tissue injury of the left chest with probable pleura damage (Tr. 84-86). The arm and foot conditions, in addition to the hernia, are likely to be permanent (Tr. 88).

On orthopedic examination by a specialist, plaintiff was seen to be suffering from a chronic sprain of the lower and upper areas of the spine, superimposed on a pre-existing dorsal arthritic change and a sprain of the metitarsus arch of the right foot (Tr. 103). The arm pain was referred, that is it was pain that goes down the nerve from the base of the neck (Tr. 103-104). The specialist also testified that the back and foot injuries would be permanent (Tr. 103-104).

Plaintiff claimed to have lost earnings of $3,500.

Defendant produced two expert witnesses in an attempt to explain why the shoring fell. Captain Devanney testified that the defendant's vessel pitched and rolled as it crossed the Columbia River Bar and that this exerted considerable force against the shoring because the cargo would be working (Tr. 60). He was

of the opinion that after the vessel arrived in Coos Bay and lay along side the dock for about four days, that the shoring was not likely to fall over without outside interference (Tr. 61-62). He also was of the opinion that the shoring used on the ship was proper if it had been rabbeted at the bottom (Tr. 63-64).

Captain Devanney stated that the inverted A frame was the most common type of shoring in use and that it would be used if possible (Tr. 63). With respect to the "rabbeting," Captain Devanney stated that not only is a block used at the end of the brace, but also on either side to keep it from slipping sideways (Tr. 66). Defendant's other expert witness, Mr. Briggs, testified that he was a hatch boss on the defendant's vessel at the time plaintiff was injured. He said that he entered the hatch and looked around the lower 'tween deck area where the accident happened, although he did not make a really careful inspection of the shoring (Tr. 158-159). In fact, he said it was a casual observation (Tr. 159).

He said that on the whole the shoring looked good to him (Tr. 160). He said that the shoring used on the S. S. OHIO was "the next best method" and that the "A frame" type is a much preferred method (Tr. 163-164).

Although the Georgia-Pacific Dock is located in Coos Bay some 11 or 12 miles from the bar, you can have some "pretty fair chops" if there is bad weather and wind blowing (Tr. 160, 165). Captain Devanney testified that if a ship were tied to a dock in port

where there are swells, and the ship is moving, there may be a little pulling out of the nails at the base of a brace against the shoring every time the weight is put on it, this being a matter of force (Tr. 67-69).

SPECIFICATION OF ERROR

I

The trial court erred in denying plaintiff-appellant's motion to withdraw alleged contributory negligence from the jury and in giving the following instructions on contributory negligence:

> "The Defendant has alleged that Plaintiff was guilty of negligence and that his negligence was the sole and proximate cause of the accident. The fact that Plaintiff was on board a vessel in the course of his employment did not relieve him of the duty of exercising reasonable care for his own safety. On the contrary, at all times while he was on board the vessel, he was required to exercise that degree of care for his own safety that would be exercised under the circumstances by a person of ordinary care and prudence.
>
> The owner of the ship says the Plaintiff himself was guilty in two respects:
>
> *First*: *In failing to maintain a proper or any* lookout for his own safety.
>
> *Second*: In loosening the existing bracing for the upright shoring without first roping off or otherwise securing the upright shoring.
>
> In determining whether Plaintiff was, himself,

negligent, you may only consider these specifications and no others.

On the claims of negligence made by the Defendant againt Plaintiff, the Defendant has the burden of proof.

I instruct you that every person who is in full enjoyment of his faculties of seeing and hearing is required to make reasonable use of all his senses and to maintain a proper lookout with a view to the discovery of perils by which he may be menaced and their avoidance after they have been ascertained.

If you find by a preponderance of evidence that the Plaintiff did not maintain such a lookout, then he would be guilty of negligence. The same would be true if you find that Plaintiff loosened the bracings for the upright shoring and that under the definition of negligence I have already given you, the Plaintiff should have refrained from loosening the existing bracing for the upright shoring without first securing the upright shoring. If either or both of these claims of negligence was the sole cause of the accident, Plaintiff could not recover, but if such negligence merely contributed to the accident, then Plaintiff would be entitled to recover. Although, as I will point out, he would be entitled to recover on a lessor rate, Plaintiff would be entitled to recover even though you find that some of his fellow-employees or the employees of the stevedoring company were negligent, and their negligence likewise contributed to the accident.

In order for Plaintiff to prevail, it is not necessary that he show that the ship was solely at fault. If he shows that the ship was at fault, or the

officers of the ship, Plaintiff is entitled to recover. Plaintiff is entitled to recover even if he himself was negligent, and if you find that the Defendant was negligent.

Some of you have sat in cases involving automobile accidents, which the judge has instructed that if the Plaintiff himself is guilty of contributory negligence, he may not recover regardless of the amount of negligence of the driver of the automobile. But, that isn't true in a case of this kind. He is entitled to recover even if he himself is negligent, provided that he shows that the ship is negligent. But, if both of them are negligent, then he is entitled to recover on a reduced basis, which I will explain to you." (Tr. 183-186).

Counsel for appellant excepted to the instruction as follows:

"Plaintiff excepts to each and every instruction given by the Court on contributory negligence. The plaintiff excepts to the Court's instructing the jury that if they found either one of the charges of negligence made by the defendant was the sole cause of the accident and injury that the plaintiff could not recover—the point of that being lookout—the failure to keep the lookout." (Tr. 197)

Prior to the court instructing the jury, the plaintiff moved to withdraw from the jury all charges of alleged contributory negligence because there was no evidence to support any of the charges. The trial court denied this motion (Tr. 168).

"MR. PETERSON: Your Honor, at this time we might restate the Plaintiff moves to withdraw con-

sideration from the jury any charge of alleged contributory negligence because there is no evidence to support any of the charges.

THE COURT: The motion is denied. There is evidence from which the jury could find that this accident could not have happened except for the negligence of the Plaintiff himself.

The evidence was the shoring was installed at Longview; that the vessel came in heavy seas through the bar down to Coos Bay; and, that at Coos Bay there was little motion; for four days it stayed that way; and then all of a sudden, the Plaintiff goes down and it falls.

The expert testimony was that it's very unlikely that this shoring would have given away, particularly after it had gone through these heavy seas without some human intervention.

If the jury believes that, then they can find negligence or contributory negligence on the part of the Plaintiff." (R. 168-169).

ARGUMENT

The trial court erred in instructing the jury as to contributory negligence and in failing to withdraw the issue of contributory negligence from the jury. There was no evidence to support this instruction, and as a matter of law, plaintiff was free from contributory negligence.

The appellee charged the plaintiff with three specific acts of contributory negligence, namely failure to keep a lookout, loosening the bracing prior to roping off the upright shoring, and failure to rope off the

upright shoring prior to removing the existing bracing. The last two specifications of error present substantially the same idea.

There is not the silghtest evidence that the plaintiff or anyone else in the hole touched the shoring and bracing which collapsed upon plaintiff. In fact, plaintiff steadfastly denied having worked in that area at all (Tr. 9-10, 36-37). Defendant's son, Gene Koivunen, testified that no one had touched the forward braces or shoring prior to the accident (Tr. 49, 52). The only testimony was to the effect that plaintiff and his coworkers were working in another part of the hold at the opposite end, that is from the aft end forward on the starboard side, whereas it was the shoring on the forward end of the hold that collapsed (Tr. 47, 7, 8).

As for the allegation of negligence to the effect that plaintiff failed to keep a lookout, it should be held as a matter of law that none was required under the circumstances or that such failure could not have been a proximate cause of plaintiff's injury. The only evidence was that the plaintiff and his son started from the aft end of the hatch, working forward. They had started to remove the shoring after making it secure with a gantline. He stopped momentarily to move his thermos bottle to the forward end of the hold where it would not be in danger and he placed it on some bales of paper. As he was walking back he stooped over to pick up a peavey and the shoring from the forward end collapsed upon him (Tr. 7-8).

On this state of facts, and this is all the evidence in

the record, the allegation of failure to keep a lookout is not supported in any way and submission of it to the jury permitted it to speculate on this aspect of the case.

Where there is no evidence of contributory negligence, it is error for the trial court to submit any allegations thereof to the jury. In *Fitzgerald* v. *Polish Ocean Lines,* 337 F.2d 376, 1965 A.M.C. 1369 (C.A. 4, 1964), a longshoreman was injured when a bundle of dunnage fell from storage in the hold. The jury returned an award which was reduced 20% for his contributory negligence. On appeal, the full award of the jury was reinstated because there was no contributory negligence proven.

The case at bar is not unlike that of *Mason* v. *Mathiasen Tanker Industries,* 298 F.2d 28, 1962 A.M.C. 860 (C.A. 4, 1962). In that case, the plaintiff slipped on engine room oil and fell down a ladder. The defendant attempted to insinuate that plaintiff had a fainting spell, which plaintiff denied. There was no evidence of plaintiff having fainted or having taken any medication. The trial court charged the jury with contributory negligence, but on appeal the judgment was reversed and a new trial given on the issue of damages. In so doing, the appellant court stated as follows:

> ". . . the charge was given concerning contributory negligence and the jury was permitted to speculate that in some way the plaintiff's own negligence may have caused him to fall. We believe this was error which may have affected the amount of the verdict." 62 A.M.C. at 866.

A very early case had facts similar to the case at bar. In *Gerrity* v. *Bark Kate Cann,* 2 F. 241 (D.C. E.D. N.Y., 1880), aff'd. 8 F. 719, libelant was loading grain and while waiting for the spout to be moved, he was sitting down in the 'tween decks. Dunnage was stowed in a rack up above him and while he was sitting there, the rack gave way and the dunnage fell upon the libelant and he was injured. The eminent Admiralty Judge, D. S. Benedict held:

> "The evidence leaves no room to contend that the libelant is in any way reasonable for the falling of the dunnage upon him. He had nothing to do with the stowing of it, nor is there any evidence of his having interfered with it after it was stowed; nor was its fall occasioned by any act of his." 2 F. at 242.

So in the case at bar plaintiff had nothing to do with the stowing of the paper nor is there a single iota of evidence of his having interfered with it after it was stowed nor did the shoring fall by reason of any act of his.

It cannot be argued with any logic that plaintiff was negligent in failing to object to the manner in which the shoring was built. This was not the duty of the plaintiff; he was merely at the lowest rung of the level of authority and was hired to simply take orders. This rule has been applied in several recent cases such as *Ballwanz* v. *Isthmian Lines,* 319 F.2d 457, 1964 A.M.C. 1480 (C.A. 4, 1963) and *Simpson* v. *Royal Rotterdam Lloyd,* 225 F.S. 947, 1964 A.M.C. 1171 (U.S. D.C. S.D. N.Y., 1964). In the *Ballwanz* case the plain-

tiff longshoreman was injured when a wooden spreader not affixed to a wire sling fell onto him while being withdrawn from the hold. The court held that the use of the spreader in this way was negligent and that the longshoreman had no duty to protest a method which he was instructed to follow, nor was he responsible for the stevedore company's method of operation. The court explicitly refused to apply the doctrine of assumption of risk.

In the *Simpson* case, a longshoreman was injured when an ingot slipped off a load which he was unloading. The court held the ship liable for grease on the ingot and refused to consider the claim of the ship that the plaintiff was guilty of contributory negligence. The court there pointed out that the longshoreman was only following instructions and was injured solely by reason of the defective stow.

Even an extreme case like that of a longshoreman who slipped on a ladder because the rung was too narrow, the appelate court has reversed a trial court's assessment of contributory negligence, holding that the sole cause of the accident was the defective ladder. *Smith* v. *U.S.A.*, 336 F.2d 165, 1965 A.M.C. 153 (C.A. 4, 1964). The policy underlying cases of this type is that longshoremen are not in a position to protest defective conditions or remedy them and are more or less at the mercy of the employers and should not be held liable in any way for accidents resulting from defective appliances or defective stowage

The trial court in this case accepted the argument

of the defendant that even though there was no testimony that any of the longshoremen had touched the stowage at the forward end of the hold, they must have done so because nothing else would make it fall. This ignores the testimony of the expert witnesses of the defendant that where a ship is tied to a dock, if the water swells, the ship will move and the cargo will exert pressure against the shoring. Coos Bay is a port where the water does get choppy from time to time if the wind is blowing and one could have chops right off the Georgia-Pacific dock (Tr. 160).

The defendant attempted to emphasize that the stowage was safe and practical because it survived the crossing of the Columbia River Bar in moderately heavy winds. But by the same token, the rough trip across the Columbia River Bar could have so weakened the imperfect bracing of the stowage that even the small choppiness of the water at the Georgia-Pacific dock in Coos Bay eventually broke the bracing loose and caused the stowage to collapse.

CONCLUSION

There is not a single bit of direct evidence to indicate that anyone touched the shoring or the bracing at the forward end of the hold before it collapsed on the plaintiff. The defendant's theories as to what might have caused the collapse remain just that, theories without any factual basis in the record. Even Captain Devanney's testimony was that the type of shoring used in this case was good only if it was rabbeted at the

bottom (Tr. 63), and the evidence is that there was no rabbeting or lateral piece at the foot of the toms or braces to keep them from pulling out (Tr. 11).

On the record then it is clear that there is not a single bit of evidence of contributory negligence on the part of the plaintiff and it was clear error for the trial judge to submit this issue to the jury. The cause should be remanded to the district court for a new trial on the issue of damages alone.

Respectfully submitted,

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APPENDIX

PLAINTIFF'S EXHIBITS

Number	Description	Iden.	Rec'd.
8	Sketch of inside ship	9	12
10	Sketch of a model ship	15	15
5	Report of Dr. Bauer, M.D.	20	20
1	Sketch of area of ship drawn by Gene Koivunen	50	50
2	A through I medical X-rays	74	74
3	C and D X-rays	102	102
6	Skeleton of foot	171	171

DEFENDANT'S EXHIBITS

Number	Description	Iden.	Rec'd.
22	P.M.A. report	34	34
21	Extract of ship's log	58	58

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant